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In The

Supreme Court of the United States

October Term, 1985

PAINTERS LOCAL UNION NO. 164 OF THE BROTHERHOOD OF PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA, AND TRUSTEES OF THE PAINTERS, DECORATORS AND PAPERHANGERS OF AMERICA LOCAL NO. 164 HEALTH & WELFARE PLAN,

Petitioners,

v.

JAMES L. EPLEY, an individual and doing business as EPLEY COATINGS and HISCO CONSTRUCTION,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. May a construction industry employer, who hires on a project-by-project basis, repudiate a pre-hire agreement, authorized by §8(f) of the National Labor Relations Act, at any time prior to the Union's attainment of majority status in the appropriate unit?

(Restatement of Questions 1, 2 and 3 in the Petition for Writ of Certiorari.)

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 764 F.2d 1509. (Pet. App. 1A-9A) The Opinion and Order of the United States District Court is not reported. (Pet. App. 12A-25A)

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act,

29 U.S.C. 151 *et. seq.*, are set forth at Pet. 2. The National Labor Relations Act will hereinafter be referred to as "the Act".

STATEMENT OF THE CASE

Statement of Facts

Respondents, JAMES L. EPLEY, d/b/a EPLEY COATINGS and HISCO CONSTRUCTION (hereinafter referred to as "Epley") will rely upon the Statement of Facts as set forth in the Opinion of the Court of Appeals for the Eleventh Circuit reported at 764 F.2d 1509 and included in the Appendix to the Petition at p. 1A. Additionally, Epley wishes to correct some of the facts as recited in the Petition.

Epley informed Painters Local Union No. 164 ("the Union"), prior to undertaking the Tuttle-White construction project, that the Blount Island job would be both the first and last union job undertaken by Epley. There was no dispute that Epley repudiated the pre-hire contract prior to the time any financial obligations under that agreement arose on the Tuttle-White job. Both the Union's business agent and Epley testified consistently in the District Court that Epley verbally communicated his intention to repudiate the pre-hire agreement, and, by his subsequent conduct, also repudiated the agreement. See Appendix to the Petition at Page 5A; 764 F.2d at p. 1511-12. After telling the Union's business agent that all future jobs would be "non-union", Epley refused thereafter to sign any new project agreement with the Union after the initial agreements had expired. Pet. App. 4A. He utilized non-union labor exclusively on the Tuttle-White job which commenced in May of 1978. When confronted by the Union's business agent and a picket line protesting the use of non-union labor at the Tuttle-White jobsite, Epley reaffirmed that he no longer intended to be bound by the pre-hire agreement with the Union. Pet. App. 5A.

Repudiation was, thus, not a disputed factual issue in the District Court. Neither was the Union's lack of majority

status on the Tuttle-White job. The parties stipulated the Union never represented a majority of Epley's employees on the Tuttle-White job. P.App. 9A; 764 F.2d at p. 1514. Epley was a project-by-project employer and had no stable work force that he utilized on any particular project.

Based upon uncontradicted evidence regarding repudiation prior to accrual of any financial obligations on the Tuttle-White project, the Union's lack of majority status on the Tuttle-White project and Epley's status as a "project-by-project employer", the District Court decided the case on an erroneous application of law. The District Court concluded that once an employer signed a second successive pre-hire agreement, this automatically became a full-fledged collective bargaining agreement and could *not* be repudiated under *any* circumstances. Epley's undisputed repudiation of the agreement was held to be a nullity by the District Court. P.App. 19A-22A.

The Court of Appeals reversed the District Court's decision solely because of the District Court's erroneous legal conclusion holding Epley liable for fringe benefits accruing *after* repudiation on a construction project (Tuttle-White) where the Union did not represent a majority of the employees. P.App. 3A,6A,9A; 764 F.2d at p. 1512-13.

ARGUMENT

There is nothing novel about the decision of the Court of Appeals. The decision is consistent with, and expressly predicated upon, this Court's decisions regarding the right of both employers and unions to repudiate pre-hire agreements prior to the Union's attainment of majority status in an appropriate unit. *Jim McNeff, Inc. v. Todd,* 461 U.S. 260, 103 S.Ct. 1753, 75 L.Ed 2d 830 (1983); Pet. App. 6A. The decision of the Court of Appeals below did not plow any new ground in the pre-hire agreement arena. It is in accord with decisions from other Courts of Appeals. The decision of the Court of Appeals is also in harmony with long-standing

precedent of the NLRB. There are no compeling considerations present here which would warrant the Court's exercise of its discretionary review power.

1. In *McNeff v. Todd* this Court held that a Section 8(f) pre-hire agreement can be enforced for obligations accrued *prior to* repudiation by a minority union in an action brought pursuant to § 301 of the Act. The Court, likewise, recognized that a Section 8(f) pre-hire agreement is subject to repudiation by either party until the union establishes majority status in the appropriate unit.

Prior to *McNeff v. Todd,* the Court found in *NLRB v. Ironworkers Local 103* (Higdon), 434 U.S. 335, 98 S.Ct. 651, 54 L.Ed. 2d 586 (1978), as did the Court of Appeals below, that Section 8(f) pre-hire agreements do not automatically accord a union majority status at every jobsite simply because successive agreements are entered into between the employer and the union. There the Court noted that:

> "The proviso exposing unions with pre-hire agreements to inquiry into their majority standing by elections under § 9(c) led the Board to its decision in *R.J.Smith:* An employer does not commit an unfair labor practice under § 8(a)(5) when he refuses to honor the contract and bargain with the union and the union fails to establish in the unfair labor practice proceeding that it has ever had majority support. As viewed by the Board, a 'pre-hire agreement is merely a preliminary step that contemplates further action for the development of a full bargaining relationship'. *Ruttman Construction Co.,* 191 NLRB 701,702 (1971). The employer's duty to bargain and honor the contract is contingent on the union's attaining majority support at the various construction sites. In *NLRB v. Irvin,* 475 F.2d 1265 (CA3 1973), for example, the pre-hire contract was deemed binding on those projects at which the union had secured a majority but not with

> respect to those projects not yet begun before the union had terminated the contract . . ." 434 U.S. at 345-46;

The Court of Appeals, just as this Court had in *NLRB v. Ironworkers Local 103,* concluded that the Union must establish its majority status at each worksite where the employer is a project-by-project employer. 434 U.S. at 344-46.

In *McNeff,* this Court left open the question of what evidence would be sufficient to constitute repudiation of a pre-hire agreement. There was no necessity for reaching that issue in *McNeff,* just as there is no necessity for reaching that issue here. In *McNeff,* there was *no* evidence of repudiation prior to accrual of fringe benefit obligations enforced against the employer. There was, thus, no evidence to resolve on the issue of repudiation. The Court of Appeals below was faced with uncontradicted evidence of repudiation. Epley repudiated the pre-hire agreement prior to the time any fringe benefit obligations accrued on the Tuttle-White project. Both the Union and Epley agreed that notice of repudiation had been given. See P.App. 5A; 764 F.2d at 1512.

2. The decision of the Court of Appeals is also consistent with decisions rendered by other Courts of Appeals subsequent to this Court's decision in *McNeff.* See, *e.g., Ironworkers Local 103 v. Higdon Construction Co., Inc.,* 739 F.2d 280 (7th Cir. 1984); *Contractors, Lab., Team. & Eng. v. Harkins Const.,* 733 F.2d 1321 (8th Cir. 1984). Also see *Washington Area Carpenters' v. Overhead Door Co.,* 681 F.2d 1 (D.C. Cir. 1982); *NLRB v. Haberman Const. Co.,* 641 F.2d 351 (5th Cir. *En Banc* 1981).

All of the Courts of Appeals are in harmony with the notion that a §8(f) agreement may be repudiated by a construction industry employer at any time prior to the union's attainment of majority status in the appropriate unit. Whether or not

notice of repudiation has sufficiently been given is a question of fact which is not in dispute here since both the Union and Epley agree that notice of repudiation had been given. *Cf. Operating Eng. Pen. Trust v. Beck Eng. & Surveying,* 746 F.2d 557 (9th Cir. 1984).

3. Not only is the decision of the Court of Appeals consistent with prior decisions of this Court, it is also consistent with long-standing interpretation and application of Section 8(f) of the Act by the National Labor Relations Board. See *e.g., Acme Marble & Granite Co., Inc. and Laborers Local Union 1290,* 271 NLRB No. 147, 1984-85 CCH NLRB para. 16,676 (1984); *D'Angelo & Khan, Inc. and Bricklayers, etc. Local No. 43,* 248 NLRB No. 62, 1980 CCH NLRB para. 16,845 (1980); *Dee Cee Floor Coverings, Inc. and Resilient Floor & Decorative Covering Workers Local 1179,* 232 NLRB No. 72, 1977-78 CCH NLRB para. 18,658 (1977). The Board has also recognized that a construction industry employer may repudiate a pre-hire agreement without violating Section 8(a)(5) of the Act as long as the Union has not achieved majority status at succeeding jobsites undertaken after the original pre-hire agreement was executed. *Ibid.*

4. Petitioner mistakenly attempts to equate pre-hire agreements to which a minority union is a party with full-fledged collective bargaining agreements in a context where the Union enjoys majority support in an appropriate unit. See *Howard Johnson Co. v. Hotel Employees,* 417 U.S. 249, 84 S.Ct. 2236, 41 L.Ed. 2d 46 (1974). If a pre-hire agreement, as the Union suggests, can only be terminated in writing, then pre-hire agreements could be drafted to preclude termination, even where the Union never attained majority status in the appropriate unit. For example, a pre-hire agreement could state that it could only be terminated at the end of three years in writing. Permitting such a result would fly in the face of freedom to void pre-hire agreements by notifying the other party of intent to do so, an essential part

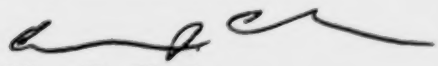
of national labor policy. *NLRB v. Ironworkers Local 103 (Higdon), supra; McNeff v. Todd, supra.* Also see *Painters District Council No. 3 Pen. Fund v. Johnson,* 566 F.Supp. 592,598 (W.D. Mo. 1983); *Cable Guide Railing Construction v. Intern. Assn., etc.,* 543 F.Supp. 405,407 (W.D. Pa. 1982). A pre-hire agreement could be drafted so that an employer would automatically be bound to successor agreements from the time the initial agreement was signed until infinity. This would surely undermine freedom of choice, one of the most important precepts of our national labor policy. See § 9 of the Act, 29 USC § 159.

5. Petitioner erroneously assumes that a pre-hire agreement may be enforced as to contractual obligations accruing *after* repudiation. This assumption apparently is caused by mischaracterizing Epley's *repudiation* as a "breach" of contract. Section 8(f) is an exception to the general rule which would ordinarily prohibit an employer and minority union from entering into a collective bargaining agreement without permitting employees in the appropriate unit to express their freedom of choice. *NLRB v. Ironworkers Local 103, supra.* Since Section 8(f) permits pre-hire agreements to be consummated between an employer and a minority union, the freedom to repudiate such agreements prior to the union's attainment of majority status in the appropriate unit is a necessary condition inherent in the relationship. *McNeff v. Todd, supra.* Repudiation is a right accorded *both* employers and unions.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been furnished to Frank E. Hamilton, Jr., Counsel of Record, Frank E. Hamilton, III, Esquire, 2620 West Kennedy Boulevard, Tampa, Florida 33609, by U. S. mail, this 27th day of March, 1986.

Attorney